

ORAL ARGUMENT SCHEDULED FOR NOVEMBER 9, 2017

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

SIERRA CLUB, et al.,)	
)	
Petitioners,)	
)	
v.)	No. 15-1487 (and consolidated
)	petitions)
UNITED STATES ENVIRONMENTAL)	
PROTECTION AGENCY, et al.,)	
)	
Respondents.)	
)	

**RESPONDENTS' MOTION TO CONTINUE ORAL ARGUMENT
AND HOLD PROCEEDINGS IN ABEYANCE**

Respondents United States Environmental Protection Agency and E. Scott Pruitt, in his official capacity as Administrator (collectively “EPA”), hereby respectfully request that the Court continue oral argument currently scheduled for November 9, 2017 and hold all proceedings in abeyance in these consolidated petitions for review.

The petitions challenge EPA regulations establishing major-source hazardous air pollutant emission standards for facilities that manufacture brick and structural clay products and clay ceramics (the “Brick/Clay Rule”). The

regulations were promulgated by the previous Administration, and EPA officials in the new Administration have determined that they will be closely scrutinizing the Brick/Clay Rule to determine whether it should be revised in whole or in part. By letter dated October 2, 2017, Administrator Pruitt informed the petitioners that EPA intends to review the Rule and may potentially propose to revise the Rule. Ex. A. EPA anticipates that the prior positions taken by the Agency may not necessarily reflect EPA's ultimate conclusions. Accordingly, continuance of the oral argument will promote judicial economy.

EPA respectfully requests that the Court hold all proceedings in abeyance and further direct EPA, within 90 days of the Court's Order on this Motion and every 90 days thereafter, to file a status update informing the Court of the status of the Agency's review of the Brick/Clay Rule until a final determination is made by the Agency.

Counsel for EPA contacted counsel for Petitioners and Intervenors concerning their positions on this Motion. The Brick Industry Association ("BIA"), the Tile Council of North America ("TCNA"), and Kohler Co. consent to the relief requested. Sierra Club and Natural Resources Defense Council oppose the Motion.

BACKGROUND

The Clean Air Act requires EPA to identify, list, and set emission limits for categories of major stationary sources of hazardous air pollutants. 42 U.S.C. § 7412(b), (c), (d). In 2003, EPA initially promulgated hazardous air pollutant standards for major sources manufacturing brick and structural clay products and clay ceramics. 68 Fed. Reg. 26,690 (May 16, 2003). This Court vacated those standards in 2007. *Sierra Club v. EPA*, 479 F.3d 875, 876 (D.C. Cir. 2007).

EPA proposed new standards on December 18, 2014, 79 Fed. Reg. 75,622, and promulgated the final Brick/Clay Rule on October 26, 2015, 80 Fed. Reg. 65,470. In December 2015, Sierra Club and Natural Resources Defense Council jointly, and Kohler, BIA, and TCNA individually, filed petitions for review of the Brick/Clay Rule. Those petitions were consolidated by this Court's December 29, 2015 Order.

Following publication of the Brick/Clay Rule, Industry Petitioners BIA, TCNA, and Kohler each submitted petitions for administrative reconsideration. On May 12, 2016—during the prior Administration—EPA denied BIA's and TCNA's petitions, and granted in part and denied in part Kohler's petition. 81 Fed. Reg. 31,234 (May 18, 2016). BIA challenged EPA's denial action and that challenge was consolidated with the challenges to the underlying rule.

EPA filed its proof brief on January 19, 2017. The Parties filed final briefs on April 28, 2017. In a September 12, 2017 Order, the Court scheduled oral argument for November 9, 2017. At this time, however, EPA officials in the new Administration intend to review the entire Brick/Clay Rule to determine whether the Agency should propose to revise the Rule or some part of it.¹

ARGUMENT

Agencies have inherent authority to review past decisions and to revise, replace or repeal a decision to the extent permitted by law and supported by a reasoned explanation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“State Farm”); *ConocoPhillips Co. v. EPA*, 612 F.3d 822, 832 (5th Cir. 2010). EPA’s interpretations of statutes it administers are not “carved in stone” but must be evaluated “on a continuing basis,” for example, “in response to . . . a change in administrations.” *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (internal quotation marks and citations omitted). See also *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038,

¹ EPA recognizes and appreciates that it is imperative that the Court be notified promptly when a potential issue arises that affects the date of oral argument. In this case, EPA officials did not determine that they would review the Brick/Clay Rule until following the scheduling of oral argument, and EPA has submitted this motion at the earliest possible opportunity.

1043 (D.C. Cir. 2012) (a revised rulemaking based “on a reevaluation of which policy would be better in light of the facts” is “well within an agency’s discretion,” and “[a] change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency’s reappraisal of the costs and benefits of its programs and regulations”) (quoting *State Farm*, 463 U.S. at 59 (Rehnquist, J., concurring in part and dissenting in part))).

EPA requests that the Court continue the oral argument currently scheduled for November 9, 2017, in these consolidated cases to allow the Administration adequate time to review the Brick/Clay Rule to determine whether to propose revisions to the Rule. As indicated in the Administrator’s October 2 letter, EPA officials in the new Administration will be closely scrutinizing the entire Brick/Clay Rule to determine whether it should be maintained, modified, or otherwise reconsidered. The Agency needs sufficient time to complete this review in an orderly fashion because the Brick/Clay Rule is based on an extensive administrative record involving a large and complex body of scientific, medical, and technical evidence. The Agency will also need to evaluate its legal and policy positions concerning the proper interpretation and application of the relevant Clean Air Act provisions.

An abeyance would preserve the resources of the Court and the Parties, as it is possible that EPA’s forthcoming review of the Rule could result in further

rulemaking that would revise or rescind some or all of the portions of the Brick/Clay Rule, thereby obviating the need for judicial resolution of some or all of the issues addressed in the Parties' briefs. Continuance is also warranted because were the Court to hold oral argument as scheduled on November 9, 2017, counsel for EPA would likely be unable to represent the current Administration's conclusive position on the Rule. Nor would it be proper for counsel for EPA to speculate on the likely outcome of the current Administration's review.

Finally, continuing oral argument would not prejudice the Parties because existing sources potentially affected by the Brick/Clay Rule have until December 26, 2018 to comply with the Rule, 80 Fed. Reg. at 65,483/2, and EPA is not aware of any new sources for which compliance would be required prior to that date. For the foregoing reasons, continuance of the oral argument and abeyance of all proceedings in this case is warranted.

CONCLUSION

WHEREFORE, EPA respectfully requests that the Court issue an order:

(a) staying oral argument presently scheduled for November 9, 2017; (b) holding all proceedings in this case in abeyance; and (c) directing EPA to report to the Court, within 90 days of the Court's Order on this Motion and every 90 days thereafter, the status of the Agency's review of the Brick/Clay Rule until a final determination is made by the Agency.

Dated: October 3, 2017

Respectfully submitted,

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Counsel for Respondents

CERTIFICATE OF COMPLIANCE

The undersigned states that this Motion complies with the typeface style requirements of Fed. R. App. P. 27(d)(1)(E) because the Motion was prepared in proportionally spaced typeface using Microsoft Word 14 point Times New Roman type, and that this Motion complies with the length requirements of Fed. R. App. P. 27(d)(2), as this Motion contains 1,204 words, excluding the parts of the Motion exempt under Fed. R. App. P. 32 (a)(7)(B)(iii).

Dated: October 3, 2017

/s/ *Kate R. Bowers*

KATE R. BOWERS

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the Court's CM/ECF system, which will send notification of said filing to all Counsel of Record.

Dated: October 3, 2017

s/ Kate R. Bowers

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EXHIBIT A



E. SCOTT PRUITT
ADMINISTRATOR

October 2, 2017

Ms. Linda Miller
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Washington, D.C. 20037

Ms. Valerie Green
Counsel for Kohler Company
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Mr. Jeffrey Longsworth
Counsel for the Tile Council of North America, Inc.
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Mr. Nicholas Morales
Mr. James Pew
Counsel for Sierra Club and National Resources Defense Council
Earthjustice
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Re: Review of final rule titled “National Emissions Standards for Hazardous Air Pollutants for Brick and Structural Clay Products Manufacturing; and National Emissions Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing; Final Rule,” 80 FR 65470 published October 26, 2015

Dear Ms. Miller, Ms. Green, Mr. Longsworth, Mr. Morales and Mr. Pew:

This letter concerns the U.S. Environmental Protection Agency final rule titled “National Emissions Standards for Hazardous Air Pollutants for Brick and Structural Clay Products

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Manufacturing; and National Emissions Standards for Hazardous Air Pollutants for Clay Ceramics Manufacturing; Final Rule” (“Brick/Clay Ceramics Rule”) published at 80 Fed. Reg. 65470 (Oct. 26, 2015), which is currently the subject of pending petitions for review in the United States Court of Appeals for the District of Columbia Circuit in Sierra Club v. EPA, No. 15-1487 (and consolidated cases).

I am writing to inform you that I have decided that it is appropriate and in the public interest for the EPA to review the provisions of the Brick/Clay Ceramics Rule. As part of this review, the EPA will consider, among other things, the issues that you have raised in the pending litigation. The EPA intends to undertake this review as expeditiously as possible to determine which aspects of the rule, if any, might warrant revision. If the EPA decides to begin the process of potentially revising provisions of the Brick/Clay Ceramics Rule, the agency will develop a proposed rule package and publish that in the *Federal Register* to give interested persons the opportunity for public comment.

If you have any questions about the EPA’s review process concerning the Brick/Clay Ceramics Rule, please contact Mr. Peter Tsirigotis in the Office of Air Quality Planning and Standards at (888) 627-7764 or airaction@epa.gov. If you have any questions about or wish to discuss the pending litigation concerning the Brick/Clay Ceramics Rule, please contact Kate Bowers at (202) 307-0930.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Scott Pruitt".

E. Scott Pruitt